

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

No. 1:04CV201

v.

Hon. Ann Aldrich

NACELLE LAND & MANAGEMENT
CORPORATION, LAKE
UNDERGROUND STORAGE
CORP., AND THE ESTATE OF
JOSEPH G. BERICK, DECEASED,

Defendants

CONSENT DECREE

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I. INTRODUCTION

WHEREAS, Plaintiff United States of America ("Plaintiff") on behalf of the Oil Spill Liability Trust Fund ("OSLTF") and its administrator, the United States Coast Guard ("U.S. Coast Guard") National Pollution Funds Center ("NPFC"), and on behalf of the United States Environmental Protection Agency ("U.S. EPA"), on February 5, 2004, filed a Complaint against Nacelle Land & Management Corporation ("Nacelle"), Lake Underground Storage Corp. ("Lake Underground"), and the Estate of Joseph G. Berick, Deceased (jointly the "Defendants"), pursuant to the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, as amended by the Oil Pollution Act of 1990 ("OPA"), Pub. L. 101-380 (August 18, 1990), and OPA, 33 U.S.C. § 2701, *et seq.*, as amended.

WHEREAS, in its Complaint, the United States seeks, pursuant to OPA, 33 U.S.C. § 2701, *et seq.*, to recover all unreimbursed oil removal costs expended by the OSLTF (currently \$1,967,005.22), plus interest under OPA Section 1005, 33 U.S.C. § 2705 (\$325,101.63 as of April 20, 2006), as well as prejudgment interest, administrative and adjudicative costs, and attorney's fees, incurred by the United States in responding to the discharge and substantial threat

of discharge of oil at and from the Nacelle Land & Management Corporation's facility located at 675 Lakeshore Blvd., Painesville Township, Lake County, Ohio ("Nacelle Facility").

WHEREAS, in its Complaint, the United States , on behalf of U.S. EPA and the OSLTF, seeks civil penalties pursuant to CWA Section 311, 33 U.S.C. § 1321(b)(7), from Defendants Nacelle and Lake Underground for discharges of oil and brine into navigable waters of the United States at or adjacent to the Nacelle Facility, and for the failure of Nacelle and Lake Underground to prepare and implement an oil spill prevention control and countermeasures program at the Nacelle Facility.

WHEREAS, on or about February 14, 2004, the United States, on behalf of the OSLTF, filed in the Probate Court of Cuyahoga County, Ohio, File No. 2004 EST 0085515, a notice of the United States' claim against the Estate of Joseph G. Berick, pertaining to the costs incurred by the OSLTF in regard to the Nacelle Facility.

WHEREAS, Defendants deny the allegations set forth in the Complaint. Defendants also deny the allegations set forth in the Notice of Claim that was filed by the United States against the Estate of Joseph Berick in Cuyahoga County Probate Court File No. 2004 EST 0085515.

WHEREAS, the Parties have agreed, and this Court, through entry of this Consent Decree, has found, that settlement of this civil action is in the public interest and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this action.

WHEREAS, the Parties agree that resolution of this civil action will also resolve the merits of the United States' claim against the Estate of Joseph Berick as set forth in the Notice of Claim that was filed by the United States in Cuyahoga County Probate Court File No. 2004 EST 0085515.

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, and except as provided in Section II (Jurisdiction, Venue and Notice), without adjudication or admission of any issue of fact or law, and without this Consent Decree constituting an admission by

Defendants of any of the allegations set forth in the Complaint or as evidence of the same, and upon the consent and agreement of the Parties, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

II. JURISDICTION, VENUE, AND NOTICE

1. This Court has jurisdiction over the subject matter of and the parties to this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1395(a), CWA Sections 309(b) and 311(b)(7)(E), 33 U.S.C. §§ 1319(b) and 1321(b)(7)(E), and OPA Section 1017(b), 33 U.S.C. § 2717(b). Venue is properly in the Northern District of Ohio pursuant to 28 U.S.C. §§ 1391 and 1395(a), CWA Sections 309(b) and 311(b)(7)(E), 33 U.S.C. §§ 1319(b) and 1321(b)(7)(E), and OPA Section 1017(b), 33 U.S.C. § 2717(b), because the violations and discharges alleged in the Complaint occurred at a facility in Painesville Township, Ohio, which is located in this judicial district, and all of the Defendants do business in, and/or reside in, or are successors to people who did business in or resided in, this judicial district.

2. This Court also has personal jurisdiction over Nacelle, Lake Underground, and the Estate of Joseph G. Berick. Solely for the purposes of this Consent Decree and the underlying Complaint, Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Defendants shall not challenge the terms of this Consent Decree, the entry of this Consent Decree, or this Court's jurisdiction to enter and enforce this Consent Decree.

3. The United States gave notice of the violations alleged in its Complaint to the State of Ohio sixty days prior to the filing of the Complaint, in the manner required by CWA Section 309(b), 33 U.S.C. § 1319(b).

III. APPLICABILITY

4. The provisions of this Consent Decree shall apply to and be binding upon the Plaintiffs and the Defendants, as well as their respective successors and assigns. No change in the ownership or corporate status of Nacelle or Lake Underground, including, but not limited to,

any sale or transfer of the Nacelle Properties, shall in any way alter or affect the obligations of the Defendants under this Consent Decree.

IV. DEFINITIONS

5. Unless otherwise defined herein, terms used in this Consent Decree shall have the meaning given to those terms in the CWA, 33 U.S.C. § 1251 *et seq.*, in OPA, 33 U.S.C. § 2701, *et seq.*, and in the regulations promulgated thereunder.

“Business Day” means all calendar days except Saturdays, Sundays and Federal or State holidays.

“Consent Decree” means this document.

“Containment Pond” means an impoundment with a capacity of approximately 20-million gallons that at all periods relevant to this action was located on Lake Underground’s portion of the Nacelle Facility.

“Corporate Defendants” shall mean Nacelle Land & Management Corporation and Lake Underground Storage Corporation.

“Defendants” means: (1) the Estate of Joseph G. Berick; (2) Nacelle Land & Management Corporation, and its associated entities as defined herein, and (3) Lake Underground Storage Corporation.

“Lake Underground Storage Corporation” or “Lake Underground” shall be deemed to include only Lake Underground Storage Corporation, in which Joseph G. Berick held a controlling interest.

“Nacelle Facility” which is more fully described in Paragraph 6 of this Consent Decree, means the facility located at 675 Lakeshore Blvd., Painesville Township, Lake County, Ohio, and owned in part by Defendant Nacelle Land & Management Corporation and in part by Lake Underground Storage Corporation.

“Nacelle Land & Management Corporation” or “Nacelle” shall be deemed to include Nacelle Land & Management Corporation and Nacelle Land and Mortgage Corporation, in

which Joseph G. Berick held a controlling interest.

“Nacelle Lease Proceeds” shall mean: (1) the lease proceeds paid by a lessee under any lease of one of the Nacelle Properties pursuant to Paragraph 22 of this Consent Decree (Lease of Nacelle Properties); minus (2) the ordinary and necessary expenses of the lease borne by the Defendants under the terms of the lease.

“Nacelle Property” or “Nacelle Properties” shall mean any and all:

a. Real property, to include all interests therein, owned by Nacelle Land & Management Corporation or Lake Underground Storage Corporation, including two pieces of real estate described as follows: (1) one piece of property comprising approximately 14.617 acres of land on Elm Street in Painesville City and Painesville Township, Lake County, Ohio, bearing tax parcel no. 35-A-002-0-00-001-0, the owner of record of which is “Nacelle Land & Mortgage Corp.” and (2) one piece of property comprising approximately 5.439 acres of land on Elm Street in Painesville City, Lake County, Ohio, bearing tax parcel no. 15-A-019-0-00-001-0, the owner of record of which is “Nacelle Land & Mortgage Corp.”

b. Property other than real property, including but not limited to, mortgages, debts, promissory notes, judgment liens, judgments, etc. held by Nacelle, Lake Underground, or the Estate of Joseph G. Berick.

“Nacelle Property Sales Proceeds” shall mean: (1) the sales proceeds paid by the purchaser(s) in any sale of the Nacelle Property pursuant to Paragraph 22 of this Consent Decree (Sale/Lease of Nacelle Property); minus (2) the ordinary and necessary expenses of the sale commonly borne by the seller including, for example, broker's fees.

“National Pollution Funds Center” and “NPFC” shall mean the unit of the United States Coast Guard with responsibility for administering the OSLTF.

“Oil Spill Liability Trust Fund” or “OSLTF” shall mean the fund established by Section 9509 of Title 26, United States Code.

“Party” or “Parties” shall mean, as applicable, Nacelle Land & Management Corporation,

Lake Underground Storage Corporation, the Estate of Joseph G. Berick, and the United States.

“Plaintiff” means the United States.

“United States” shall mean the United States of America, including all of its departments, agencies and instrumentalities.

“U.S. Coast Guard” means the United States Coast Guard, a component of the United States Department of Homeland Security, and any successor agency.

“U.S. EPA” means the United States Environmental Protection Agency, an agency of the United States, and any successor agency.

V. FACILITY DESCRIPTION/GOVERNMENT ACTIONS

6. The Nacelle Facility consists of a 50-acre parcel owned by Lake Underground and a 23-acre parcel owned by Nacelle. The Nacelle Facility is adjacent to Blackbrook Creek, which flows into the Grand River, which is a tributary of Lake Erie. The Nacelle Facility also is adjacent to Pebble Creek, which flows into the Mentor Marsh, which also is a tributary of Lake Erie as well as a State of Ohio nature preserve. Blackbrook Creek and Pebble Creek are serviced by unnamed tributaries. Blackbrook Creek, the Grand River, Pebble Creek, Mentor Marsh, Lake Erie and their associated unnamed tributaries are navigable waters of the United States within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7), and OPA Section 1001(21), 33 U.S.C. § 2701(21).

7. Prior to 1984, Lake Underground was in the business of storing liquid propane in underground salt mining caverns and above-ground storage tanks at the Nacelle Facility.

8. From approximately 1984 through at least 1989, Nacelle was in the business of accepting oil field waste, consisting of oil and brine, at the Nacelle Facility. Nacelle placed the oil and brine in the Containment Pond. The brine was injected by Nacelle into an adjacent brine injection well.

9. On November 1, 1994, U.S. EPA representatives inspected the Nacelle Facility and observed among other things an impoundment area consisting of an approximately 3,000-

gallon storage tank and the Containment Pond. A report of the November 1, 1994 inspection states that a synthetic liner in the Containment Pond was torn in several places and that the Containment Pond was not covered. The inspectors estimated that the Containment Pond contained approximately 16,800,000 gallons of oil and water; a 3,000-gallon storage tank contained approximately 2,250 gallons of oil; and tanker trucks contained about 25,000 gallons of oil. The inspectors also determined, among other things, that: (1) the Nacelle Facility had no Spill Prevention, Control and Countermeasures Plan ("SPCC" Plan) (as required by 40 C.F.R. § 112.3); (2) there was no secondary containment around a storage tank (as required by 40 C.F.R. § 112.7(e)(2)(ii)); and (3) there were no dikes or diversion ponds for the on-site tanker trucks or the Containment Pond (as required by 40 C.F.R. § 112.7(c)(1)(I) and (v)).

10. On or about April 26, 1996, U.S. EPA and Ohio EPA observed that a 12-inch notch that had been cut into the Containment Pond had allowed oil and brine to flow down gradient, via a gutter, into a 20-cubic yard metal box situated at the edge of the Nacelle Facility, and that oil and brine were leaking out of the box into an unnamed tributary of Mentor Marsh.

11. On or about May 14, 1996, a U.S. EPA representative visited the Nacelle Facility and recorded that there was no secondary containment for any of the above ground tanks.

12. By letter dated May 24, 1996, U.S. EPA requested that Joseph G. Berick, a person who held a controlling interest in Nacelle and Lake Underground and the operator of the Nacelle Facility, provide U.S. EPA access to the Nacelle Facility to conduct cleanup activities pursuant to CWA Section 311. During a June 12, 1996, telephone conversation, Joseph G. Berick denied U.S. EPA access to the Facility.

13. On June 17, 1996, U.S. EPA, pursuant to CWA Section 311(c), (e) and (m), 33 U.S.C. § 1321(c), (e) and (m), issued a Unilateral Administrative Order ("UAO") to Lake Underground Storage Corp., Nacelle Land & Management Corp., and Joseph G. Berick,

requiring those parties to abate “an imminent and substantial threat to the public health or welfare of the United States. . . because of an actual or threatened discharge of oil from a facility in violation of Section 311(b) of CWA, 33 U.S.C. § 1321(b).” The UAO required Nacelle, Lake Underground and Joseph G. Berick, among other things, to notify U.S. EPA, by June 20, 1996, of their intent to comply with the UAO and by June 22, 1996, to retain a contractor, designate a project coordinator, and submit to U.S. EPA for approval a draft plan for performing the removal action. Nacelle, Lake Underground and Joseph G. Berick did not comply with the UAO.

14. A U.S. EPA representative inspected the Nacelle Facility on June 19, 1996, estimated that 50,000 to 100,000 gallons of oil and brine had been discharged from the Containment Pond, and observed conditions indicating that the oil and brine that had been discharged from the Containment Pond had reached Mentor Marsh.

15. On June 27, 1996, Joseph G. Berick granted U.S. EPA access to the Nacelle Facility for a 30-day period. From June 28, 1996 through July 23, 1996, U.S. EPA conducted an emergency removal action at the Nacelle Facility in response to the discharges of oil and substantial threats of discharge of oil at the Facility.

16. On July 26, 1996, U.S. EPA, pursuant to CWA Sections 308 and 309(a), 33 U.S.C. §§ 1318 and 1319(a), issued Nacelle, Lake Underground and Joseph G. Berick a Findings of Violations and Compliance Order, U.S. EPA Docket No. V-W-96-AO-10 (“Order”) which found that discharges from the Containment Pond on November 18, 1995, April 26, 1996, May 6, 1996, June 18, 1996, and June 26, 1996, violated CWA Section 301, 33 U.S.C. § 1311. The Order required Nacelle, Lake Underground and Joseph G. Berick, among other things, to submit to U.S. EPA a schedule outlining a plan to either eliminate the unpermitted discharge from the Containment Pond, or provide adequate treatment of the flow prior to discharge.

17. The costs incurred by the United States in 1996 in responding to the discharges of oil and substantial threats of discharge of oil at the Nacelle Facility were paid from the OSLTF under Federal Project Number (FPN) 096029. Those costs totaled \$378,390.97, plus

\$121,901.30 in accumulated interest as of April 20, 2006.

18. On September 16, 1999, U.S. EPA representatives observed that the Containment Pond's synthetic liner was torn in several locations and was covered by a thick layer of oily sludge. On the basis of this report, a U.S. EPA On-Scene Coordinator determined that these conditions presented a substantial threat of a discharge of oil into or upon navigable waters of the United States and that an emergency removal was required.

19. From September 28, 1999 until April 27, 2000, U.S. EPA conducted a removal action at the Nacelle Facility during which U.S. EPA removed to off-site locations the contents of the above ground tanks, contaminated soils, and the synthetic liner for the Containment Pond, and solidified and moved to off-site locations oil and oil sludge from the Containment Pond.

20. The costs incurred by the United States in 1999 and 2000 in responding to discharges of oil and substantial threats of discharge of oil at the Nacelle Facility were paid from the OSLTF under FPN G99032 by the NPFC. Those costs totaled \$1,588,614.25, plus \$203,200.33 in accumulated interest as of April 20, 2006.

VI. OBLIGATIONS OF DEFENDANTS

21. Reimbursement of Removal Costs to the U.S. Coast Guard.

Within 30 days following the date of entry of this Consent Decree by the Court, the Corporate Defendants shall pay the amount of TWO HUNDRED THOUSAND DOLLARS (\$200,000) to the U.S. Coast Guard in satisfaction of the United States' claim for the Removal Costs incurred by the OSLTF at the Nacelle Facility under FPN Nos. 096026 and G99032. The Corporate Defendants shall make the payments described in the preceding sentence by Fedwire Electronic Funds Transfer ("EFT") to the United States Department of Justice, in accordance with current EFT procedures and instructions to be provided to the Corporate Defendants' Counsel by the Office of the United States Attorney for the Northern District of Ohio. The payments shall reference the Civil Action Number assigned to the case (1:04CV201 (N.D. Ohio)), U.S.A.O. File Number 2004V00295, DOJ Case Number 90-5-1-1-4365, and shall

specify that the payments are made toward Oil Pollution Act removal costs to be deposited into the Oil Spill Liability Trust Fund and credited to Federal Project Number 096026 and G99032 in proportional amounts pursuant to 26 U.S.C. § 9509(b), 33 U.S.C. §§ 2701, *et seq.*, and 33 U.S.C. §§ 1321, *et seq.* Any funds received after 11:00 a.m. Eastern Standard Time shall be credited on the next Working Day. The Corporate Defendants shall submit to the United States, as provided in Section X (Notices and Submissions), notice of all payments made pursuant to this Paragraph shall be made within 10 days of the date of the payment.

22. Sale/Lease of Nacelle Property. Within five years following the date of entry of this Consent Decree by the Court, if they have not already done so, the Corporate Defendants shall use best efforts to sell any and all real property included in the definition of Nacelle Properties, for the highest price possible and, in any event, at a price no less than fair market value. The Corporate Defendants shall continue to make such efforts until such time as the real property has been sold. Should the Corporate Defendants decide, as an interim measure, to lease any of the Nacelle Properties prior to selling them, the rent proceeds from the lease shall be treated in the same manner as the sale proceeds, as discussed below.

a. Any contract of sale or lease of any of the real property included in the definition of Nacelle Properties shall state that such transaction is conditioned upon the United States' approval.

b. Any and all leases for any of the real property included in the definition of Nacelle Properties shall be fully transferable so as not to interfere with the sale of said Properties, and shall be subject to the terms of this Consent Decree.

c. All consideration for a sale shall be paid at the time of the closing, unless the United States agrees to a different arrangement.

d. Within two days of entering into a contract for sale or lease of any of the real property included in the definition of Nacelle Properties, the Corporate Defendants shall provide the United States with a copy of the contract and a notice to the United States indicating

the identity of the purchaser or lessee, the expected amount of the total Nacelle Property Sales Proceeds or Nacelle Property Lease Proceeds, as applicable, and the expected amount of the Nacelle Property Sales Proceeds or Nacelle Property Lease Proceeds that would be paid to the OSLTF. The Corporate Defendants shall provide to the United States at least 21 days prior to closing an appraisal as to the fair market sale or rental value of the real property being sold or leased. The United States shall approve the sale or lease if it determines that the Corporate Defendants have properly calculated the amount of the Nacelle Property Sales Proceeds or Nacelle Property Lease Proceeds, as applicable, and the OSLTF's share of said Nacelle Property Sales Proceeds or Nacelle Property Lease Proceeds, and if the United States determines, in its sole discretion, that the sale or lease is at fair market value and will not unduly delay the sale of the involved property. If the United States fails to notify the Corporate Defendants of its approval or disapproval of a sale or lease within 21 days of receipt of the proposed closing date, the United States shall be deemed to have approved the sale or lease. This 21-day period shall not begin to run until the appraisal and all other all notices required by this Paragraph are provided to the United States, including the U.S. Coast Guard, as set forth in Section X (Notices and Submissions).

e. As a condition precedent to the closing of any sales transaction, the Corporate Defendants shall direct the closing agent to pay to the OSLTF 40% of the amount of the Nacelle Property Sales Proceeds for that sale, as further reimbursement of the removal costs incurred by the OSLTF, within 30 days of closing. Similarly, the Corporate Defendants shall pay to the OSLTF 40% of any Nacelle Property Lease Proceeds on a monthly basis within 15 days of receipt by the Corporate Defendants of each monthly payment. The OSLTF 40% share of Nacelle Property Sales Proceeds and Nacelle Property Lease Proceeds, shall continue to be payable until the Corporate Defendants reimburse the total amount of the removal costs incurred by the OSLTF (including interest under OPA Section 1005, 33 U.S.C. § 2705), or all of the Nacelle Properties are sold at fair market value.

f. Payments of oil removal costs and penalties to the OSLTF shall be made by certified check, cashier's check, or attorney check made payable to "United States" referencing the name and address of the party making payment, U.S.A.O. File Number 2004V00295, DOJ Case Number 90-5-1-1-4365 and FPN Nos. 096026 and G99032. Nacelle shall direct said payment checks to:

Financial Litigation Unit
United States Attorney
Northern District of Ohio
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852.

At the time payment is made, Nacelle shall send notices of such payment to the United States, including a separate copy of the notice to the U.S. Coast Guard NPFC and the Department of Justice in accordance with Section X of this Consent Decree (Notices and Submissions).

23. The United States does not assume any ownership or operational interest in the Nacelle Properties by virtue of this agreement, and the Defendants may not assert anything to the contrary in any court of law.

24. Judgment Lien.

a. Within 15 days of notice of entry of this Consent Decree, Nacelle shall file in the land records office of Lake County, Ohio a consent judgment lien, in the form attached hereto as Appendix A, indicating that a consent judgment has been entered in this action requiring the Defendants to make the payments set forth in Paragraph 22 of this Consent Decree from the proceeds of any sale of the Nacelle Properties, and placing a consent judgment lien on the Nacelle Properties in the amount of the OSLTF funded removal costs (\$1,967,005.22), plus accumulated interest (\$325,101.63 as of April 20, 2006).

b. Within 30 days of receipt by the OSLTF of a 40% share of the Nacelle Property Sales Proceeds from the sale of any one of the Nacelle Properties, the United States will deliver to the closing agent a satisfaction and discharge of judgment lien as to that Nacelle

Property to be filed in the land records of Lake County, Ohio, as appropriate, with the other closing documents.

25. Disposition of Property Other than Real Property: In the event that the Corporate Defendants own any Nacelle Property other than the real property that is defined or described in this Consent Decree, then within 30 days of the closing date for the sale or disposition of such other Nacelle Property, the Corporate Defendants shall pay to the OSLTF 40% of the Nacelle Property Sales Proceeds paid by the purchaser(s) in any sale of any such Nacelle Property, minus the following expenditures:

- a. The costs required to expunge any liens against the property;
- b. The costs of any efforts required to secure or collect such property, including reasonable attorney fees;
- c. Any commissions that are payable upon the sale of such property;
- d. Any taxes that are owed upon the sale of the property; and
- e. Normal and customary closing costs.

26. Payment of Civil Penalty.

Within 30 days following the entry of this Consent Decree by the Court, the Corporate Defendants shall pay ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) to the OSLTF pursuant to 26 U.S.C. § 9509(b)(8), 33 U.S.C. § 1321(s), and Section 4304 of the Oil Pollution Act of 1990, Pub. L. 101-380 (Aug. 18, 1990), 104 Stat. 573, in full settlement of the United States' claim for civil penalties under CWA Section 311, 33 U.S.C. § 1321. Interest shall accrue on any unpaid balance not paid on or before the due date thereof until such amount, including accrued interest, is paid in full. Interest shall be calculated at the rate established by the Secretary of the Treasury pursuant to 28 U.S.C. § 1961. The Corporate Defendants shall make the payments described in the preceding sentence by Fedwire Electronic Funds Transfer (EFT) to the United States Department of Justice, in accordance with current EFT procedures and instructions provided to the Corporate Defendants by the Office of the United States Attorney for

the Northern District of Ohio. The payments shall reference the Civil Action Number assigned to this case (1:04CV201 (N.D. Ohio)), U.S.A.O. File Number 2004V00295, DOJ Case Number 90-5-1-1-4365, and the Oil Spill Liability Trust Fund-311. Any funds received after 11:00 a.m. Eastern Standard Time shall be credited on the next Working Day. The Corporate Defendants shall submit to the United States and the United States Coast Guard, as provided in Section X (Notices and Submissions) notice of all payments made pursuant to this Paragraph within 10 days of the date of the payment.

27. The Corporate Defendants shall be liable for attorneys' fees and costs incurred by the United States in collecting any amounts not paid when due under this Consent Decree.

VII. CERTIFICATION OF DEFENDANTS' FINANCIAL STATUS

28. The United States enters into this Consent Decree based on the Defendants' representations regarding their financial condition. Defendants Nacelle Land & Management Corp., Lake Underground Storage Corp. and the Estate of Joseph G. Berick, by entering into this Consent Decree, certify that they are now, and for all times relevant to this litigation, have been, financially unable to pay the removal costs and the civil penalties identified herein and in the Complaint and demanded by the United States in one lump sum or over three years, and that they have made available to the United States all relevant financial information and documentation.

VIII. COVENANT AND RESERVATION OF RIGHTS BY PLAINTIFF

29. In consideration of the actions to be taken and payments to be made by the Defendants, as described herein, and except as specifically provided in this Paragraph, the United States covenants that it will not further sue or take administrative action against Defendants Nacelle Land & Management Corporation, Lake Underground Storage Corp., and the Estate of Joseph G. Berick, seeking penalties pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and/or the recovery, pursuant to the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, of unreimbursed removal costs incurred to date by the United States under FPN Nos. 096026 and G99032 in responding to discharges and substantial threats of discharge of oil at the

Nacelle Facility as alleged in the Complaint.

30. This covenant extends only to Defendants Nacelle Land & Management Corporation, Lake Underground Storage Corporation, and the Estate of Joseph G. Berick, and does not extend to any other persons.

31. **Reservations of the United States.**

a. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to either reinstitute proceedings in this action or institute a new action seeking to compel Defendants Nacelle Land & Management Corporation, Lake Underground Storage Corporation, and/or the Estate of Joseph G. Berick, or their respective successors or assigns to pay the entirety of the removal costs incurred by the United States, and expended by the OSLTF, in connection with removal actions undertaken by the United States at the Nacelle Facility plus interest under OPA Section 1005, 33 U.S.C. § 2705, (minus the \$200,000 and other amounts then paid by the Defendants under Paragraph 22) in one lump sum if, within 10 years following the date of entry of this Consent Decree, the United States learns from any source that the financial information available to the United States on the date of lodging of this Consent Decree, or the Defendants' certification of financial inability in Section VII of this Consent Decree, was incorrect or incomplete as of the date of lodging of this Consent Decree, to the extent that such information materially understated the financial worth of Defendants. The right of the United States under this Paragraph to reinstate proceedings or institute a new action seeking to compel payment may be exercised only against a Defendant that materially understated its worth.

b. The covenant in Paragraph 30 does not pertain to any matters other than those expressly specified in that Paragraph. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Defendants with respect to all matters other than those expressly specified herein, including, but not limited to:

- (1) claims against Defendants based on their failure to meet a

requirement of this Consent Decree;

- (2) any and all criminal liability;
- (3) past, present, or future releases, discharges, or substantial threats of discharge of oil other than those described in this Consent Decree;
- (4) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- (5) actions pursuant to Section 311(c)(1)(A) of the CWA, 33 U.S.C. § 1321(c)(1)(A) or Section 1002(b)(1) of OPA, 33 U.S.C. § 2702(b)(1), to mitigate or prevent a discharge or a substantial threat of discharge of oil or a hazardous substance;
- (6) claims based on rights subrogated to the OSLTF for any amounts paid or to be paid by the OSLTF to any person for removal costs or damages in connection with the discharges and substantial threats of discharge of oil described in this Consent Decree.
- (7) claims arising after the date of lodging of this Consent Decree; and
- (8) claims unrelated to the Nacelle Facility.

32. For purposes of Sections VII and VIII, the financial information pertaining to Defendants in the possession of the United States on the date of lodging of this Consent Decree includes only such financial information that the United States obtained from Defendants during the pendency of this action and prior to the filing of this Consent Decree.

IX. COVENANT AND RESERVATION OF RIGHTS BY DEFENDANTS

33. Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or any of its agents and employees, successors and assigns, with respect to:

- a. any claim for reimbursement from the OSLTF through OPA Sections 1012 and 1013, 33 U.S.C. §§ 2712 and 2713, or any other provision of law;
- b. any claims arising out of removal activities at the Nacelle Facility, including claims based on U.S. EPA's and the State of Ohio's selection of response actions,

oversight of removal activities or approval of plans for such activities; or

c. the payments to be made by the Corporate Defendants under Section VI of this Consent Decree.

34. Nothing in this Consent Decree shall affect in any way the rights or defenses available to Defendants not expressly waived should the United States exercise any rights reserved in Paragraph 32 above.

X. NOTICES AND SUBMISSIONS

35. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, DOJ, the U.S. Coast Guard, U.S. EPA, and the Defendants:

As to the United States:

As to DOJ:

Chief
Environmental Enforcement Section
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
Re: DOJ No. 90-5-1-1-4365

As to the U.S. Coast Guard

Rachel M. Hopp
Attorney-Advisor
National Pollution Funds Center/Legal Division
United States Coast Guard
4200 Wilson Blvd., Suite 1000
Arlington, Virginia 22203
(Re: FPN 096026 and FPN G99032)

CDR Thomas Beistle, Chief
United States Coast Guard
Office of Claims and Litigation
2100 Second St., S.W.
Washington, DC 20593-0001
(Re: FPN 096026 and FPN G99032)

As to U.S. EPA

Thomas Bramscher
Chief, Enforcement Section
Water Division
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Deirdre Tanaka
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

As to the Defendants

James M. Lyons, Esq.
Lyons & O'Donnell
240 East Main Street
Painesville, Ohio 44077

Steven J. Forbes, Esq.
Norchi, Barrett & Forbes LLC
Commerce Park IV
23240 Chagrin Blvd., Suite 600
Beachwood, Ohio 44122

XI. RETENTION OF JURISDICTION

36. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XII. TERMINATION

37. This Consent Decree may be terminated by this Court upon the Court's granting a motion by Defendants, after certification by Defendant to the United States and the Court that Defendant has achieved compliance with all provisions of this Consent Decree, including payment of all costs and civil penalties due under the Consent Decree. The United States shall

advise the Court, within 30 days of the filing of Defendants' motion, as to the propriety of such motion to terminate.

XIII. GENERAL PROVISIONS

38. The provisions of this Consent Decree shall apply to and be binding upon the Plaintiff and Defendants, as well as their respective successors and assigns.

39. Defendants consent to the entry of this Consent Decree without further notice.

40. Within 30 days following the United States' receipt of the amounts to be paid by the Defendants under Paragraphs 22 and 26, the United States shall notify the Probate Court of Cuyahoga County, Ohio, that the United States no longer has a claim against the Estate of Joseph G. Berick.

41. This Consent Decree shall not constitute an admission of liability, or guilt or culpability by Defendants.

42. No party shall make an application under Rule 54(d), Fed. R. Civ. P., and each party hereto will bear their own costs, fees, and expenses, including any attorney fees.

XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

43. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate.

XV. SIGNATORIES/SERVICE

44. Each of the undersigned representatives of the Defendants and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

45. The Defendants hereby agree not to oppose entry of this Consent Decree by this

Court or to challenge any provision of this Consent Decree unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

46. Each of the Defendants shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Each of the Defendants hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XVI. FINAL JUDGMENT

47. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

48. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Participating Parties. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS __ DAY OF _____, 20__.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corporation, et al.*, No. 1:04CV201(N.D. Ohio).

FOR PLAINTIFF UNITED STATES

DATE

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division

Date

GREGORY L. SUKYS
Senior Attorney
U.S. Department of Justice
Environmental Enforcement Section
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044
(202) 514-2068/616-6584 (Fax)

Of Counsel:

RACHEL M. HOPP
Attorney-Advisor
National Pollution Funds Center
Legal Division
United States Coast Guard
4200 Wilson Blvd., Suite 1000
Arlington, Virginia 22203

CDR Thomas Beistle, Chief
United States Coast Guard
Office of Claims and Litigation
2100 Second St., S.W.
Washington, DC 20593-0001

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corporation, et al.*, No. 1:04CV201(N.D. Ohio).

GREGORY A. WHITE
United States Attorney
Northern District of Ohio

STEVEN PAFFILAS
Assistant United States Attorney
Northern District of Ohio\
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852
(216) 622-3698

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corporation, et al.*, No. 1:04CV201(N.D. Ohio).

WALKER B. SMITH

Director
U.S. Environmental Protection Agency
Office of Civil Enforcement
Office of Enforcement and
Compliance Assurance
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

SUSHILA NANDA

Attorney Advisor
U.S. Environmental Protection Agency
Office of Civil Enforcement and
Compliance Assurance
(OECA-OCE-WED)
Ariel Rios Building
12th Street and Pennsylvania Avenue, N.W.
Mail Code 2243A
Washington, D.C. 20004
Phone: (202) 564-4088/0024 (FAX)

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corp., et al.*, No. 1:04CV201 (N.D. Ohio)

BHARAT MATHUR
Acting Regional Administrator
U.S. Environmental Protection Agency-
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

DEIRDRE M. TANAKA
Assistant Regional Counsel
U.S. Environmental Protection Agency-
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604
(312) 353-8222

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corp., et al.*, No. 1:04CV201 (N.D. Ohio)

FOR DEFENDANT NACELLE LAND
& MANAGEMENT CORPORATION

DATE: 8/21/2006

James Rose Joan Rose
Majority Shareholders

If Different from Above, the Following Is the Name and Address of the above Party's Agent for Service and the Name and Address of Said Party's Counsel. Counsel May Act as Agent for Service.

Agent for Service

Name

Address

James M. Lyons

240 E. Main St

Pennsville OH 44677

Attorney

Name

Address

James M. Lyons

240 E. Main St

Pennsville OH 44677

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corp., et al.*, No. 1:04CV201 (N.D. Ohio)

FOR DEFENDANT LAKE UNDERGROUND
STORAGE CORPORATION

DATE: 8/21/2006

James Rose Joan Rose
Majority Shareholders

IF DIFFERENT FROM ABOVE, THE FOLLOWING IS THE NAME AND ADDRESS OF THE ABOVE PARTY'S AGENT FOR SERVICE AND THE NAME AND ADDRESS OF SAID PARTY'S COUNSEL. COUNSEL MAY ACT AS AGENT FOR SERVICE.

Agent for Service

Name

Address

James M. Lyons
240 E Main St
Pennsville 0144077

Attorney

Name

Address

James M. Lyons
240 E Main St
Pennsville 0144077

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Nacelle Land & Management Corp., et al.*, No. 1:04CV201 (N.D. Ohio)

FOR DEFENDANT
ESTATE OF JOSEPH G. BERICK

Date: July 6, 2006

If Different from Above, the Following Is the Name and Address of the above Party's Agent for Service and the Name and Address of Said Party's Counsel. Counsel May Act as Agent for Service.

Agent for Service

Attorney

Name

Name

Address

Address

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	Civil No. 1:04CV201
)	
Plaintiff,)	Hon. Ann Aldrich
vs.)	
)	
)	<u>P R A E C I P E</u>
NACELLE LAND & MANAGEMENT)	
CORPORATION, LAKE)	
UNDERGROUND STORAGE)	
CORP., AND THE ESTATE OF)	
JOSEPH G. BERICK, DECEASED,)	
NAME OF DEBTOR),)	
)	
Defendant.)	

TO THE CLERK:

Please issue to this office a Consent Judgment Lien and
Abstract of Judgment in the above entitled case in the amount of
\$300,000 plus interest at the legal rate of (Interest rate)% from
the date of judgment, (Date of Judgement) and costs.

GREGORY A. WHITE
UNITED STATES ATTORNEY

By: _____

NACELLE LAND & MANAGEMENT CORPORATION

By: _____

LAKE UNDERGROUND STORAGE CORPORATION

By: _____

CONSENT JUDGMENT LIEN
AND
ABSTRACT OF JUDGMENT

NOTICE

Pursuant to Title 28, United States Code, Section 3201, this judgment, upon the filing of this abstract in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of 26 U.S.C. § 6323(f), creates a lien on all real property of the defendant(s) and has priority over all other liens or encumbrances which are perfected later in time. The lien created by this section is effective, unless satisfied, for a period of 20 years and may be renewed by filing a notice of renewal. If such notice of renewal is filed before the expiration of the 20 year period to prevent the expiration of the lien and the court approves the renewal, the lien shall relate back to the date the judgment is filed.

Names and addresses of Parties against whom judgments have been obtained		Names of Parties in whose favor judgments have been obtained
(Name of Debtor) (Address)		UNITED STATES OF AMERICA
Amount of Judgment	Names of Creditor's Attorneys	
\$(Amount of Judgment, plus interest and costs)		
		When Filed
		(Date of Judgment) (Court Docket No.)

UNITED STATES OF AMERICA,
CLERK'S OFFICE
U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

ss.

I CERTIFY, That the foregoing is a correct Abstract of the Judgment entered or registered by this Court.

Date, Cleveland, Ohio _____, 2006

Geri M. Smith, Clerk.

Clerk.

By _____, Deputy